State of Michigan

IN THE

Supreme Court

On Appeal from the Michigan Court of Appeals
White, P.J., Sawyer and Saad, J.J.

ROBERT LITTLE and
BARBARA LITTLE,

Plaintiffs/Counter-Defendants/Appellants,

– v. –

THOMAS TRIVAN; DARLENE TRIVAN; STEVEN KIN and ROSALYN KIN,

Defendants/Counter-Plaintiffs/Appellees.

Supreme Court Docket No. 121037

Court of Appeals Docket No. 220894

Trial Court Case No. 98-006136-CZ

APPELLEES' BRIEF ON APPEAL

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COUNTER-STATEMENT OF QUESTION INVOLVED

SHOULD THIS COURT REVERSE THE COURT OF APPEALS WHEN ITS DECISION IS CONSISTENT WITH LONGSTANDING MICHIGAN LAW?

Plaintiffs/Counter-Defendants/Appellants state:	"Yes"
Defendants/Counter-Plaintiffs/Appellees state:	"No"
The Court of Appeals states:	"No"

INTRODUCTION

This real estate dispute involves an easement to Pine Lake in Oakland County. Appellees have a recorded easement "for access to and use of the riparian rights to Pine Lake." Appellants seek to prevent Appellees from erecting a dock in their easement and mooring a boat.

The Court of Appeals applied longstanding law in a narrowly-crafted opinion to conclude that Appellees use is not improper as a matter of law. Rather, the scope of Appellees permitted use is a question of fact, based on the intent of the dedicator of the easement. This Court should affirm the Court of Appeals and remand this case to the Oakland Circuit Court for a determination of this factual issue.

COUNTER-STATEMENT OF FACTS

In general, Appellants accurately state the facts. However, there are four areas where Appellees differ.

First, an accurate reading of the affidavit and deposition of Leo Beil shows that he chose the words "riparian rights" in the easement because he clearly intended that the backlots have frontlot-like rights. Mr. Beil, the C.A. Muer Corporation employee charged with developing the property following the spectacular fire which destroyed the wooden Charley's Crab restaurant, stated:

> [I]n drafting the easements, the C. A. Muer Corporation always intended that Lots C, D, E and F [the backlots] would have identical rights to use Pine Lake and its beach . . . as the owners of Lots A and B. Specifically, the Corporation wanted Lots D and F, for example, to use the Lake in the same manner and engage in the same activities as Lot B [Appellees' lot]. . . .

Appellants' Appendix at 25a, Beil Affidavit at ¶9. He consulted with a lawyer. Appellants' Appendix at 43a. He understood that giving the backlots frontlot-like rights maximized their value, something he was trying to achieve. Appellants' Appendix at 41a, Beil Dep. Further, Mr. Beil testified that the easement conferred not only access to Pine Lake, but full use of it as well:

> Q: Okay, now focusing on the water use. You mentioned briefly the boat dock issue before. Could you describe for me what was intended by the C. A. Muer Corporation as far as what the owners of the lots D and F could use the water for?
>
> A: Anything legally — anything legally that they could use it for. Are you talking bout boating? Fishing? Swimming? Splashing each other? You know, I don't know. You'd have to tell me. What do you do on water? Whatever you

can do on water, you could do on the lake. Yeah.

Q: Okay. So if it was authorized by regulation — if it was authorized by regulation could the owners of lots D and F, in fact, use the — or build a dock? Was that your intention?

A: Yes, because that was definitively assigned to them, if you will, for their usage. Again, they were paying for it via the cost of land and building their house. I mean, that all came with the property — the right to.

Appellants' Appendix at 42a (emphasis added).

Second, Appellants knew of the easement when they purchased their property. When Appellants purchased the property in 1977 for $40,000, Appellees' Appendix at 1-b (Purchase Agreement), their title commitment specifically stated that the easements were for riparian rights:

> Easement granted by C.A. Muer Corporation to future owners of parcels B, D and F of Lot 5 of a permanent easement for access to and use of the riparian rights to Pine Lake. . . .

Appellees' Appendix at 3-b, Title Commitment.[1]

Appellants attempt to circumvent this evidence by relying on inadmissible hearsay. Mr. Little states in his affidavit that he was told by Richard McManus, the real estate broker, that the easement did not give the backlot owners the right to dock a boat. Since Mr. McManus did not testify, this statement is inadmissible hearsay. Moreover, Mr. Beil testified that Mr. McManus

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[1]Appellants' property has a 2001 market value of at least $633,220; two times the stated equalized value of $314,610. Appellees' Appendix at 6-b, November 1998 Land Inquiry. The Court can take judicial notice that Appellants' property value would rise dramatically if they obtained exclusive use of Pine Lake through this litigation, while Appellees' property values would certainly fall.

had no authority to make such alleged statements on behalf of the C. A. Muer Corporation:

> Q: So he [McManus] served in an advisory capacity to the company?
>
> A: I think more — as much as a real estate agent would in your transaction selling your house.
>
> Q: Okay. But it was the C. A. Muer Corporation that actually had the authority to set up and determine what the lot split would be and what easements would be; is that correct?
>
> A: Absolute authority was us, was C. A. Muer Corporation.

Appellants' Appendix at 43a. In his affidavit, Mr. Little also states what his neighbors "understood" regarding the easement. Appellants' Appendix at 30a-31a. Since the "neighbors" did not testify, such statements either lack personal knowledge or are inadmissible hearsay.

Third, Appellants fail to state that Appellees specifically relied on the easement in purchasing the property. For example, Appellee Trivan testified that his purchase of Lot D was based on his access to, and use of, Pine Lake, and the added property value the easement would create. In his affidavit, Mr. Trivan states:

> [W]e decided to purchase the house in large part because the easement gave us access to Pine Lake and its beach. Not only did this increase the quality of life, but it also insured a good return on our investment.

Appellees' Appendix at 7-b, Affidavit of Thomas Trivan at ¶3. Appellees also stated that the purchase of their homes were in reliance on the recorded easement on the C. A. Muer Corporation property. Appellees' Appendix at 7-b, 9-b, Affidavit of Thomas Trivan at ¶3, Affidavit of Steven Kin at ¶3.

Fourth, Appellants do not accurately state the historical record of their dealings with Jack

Findlay, their neighbor. The Findlays owned lot D several years before Appellee Kins. Appellants' Appendix at 27a, Affidavit of Joseph F. Ziomek at ¶3. In the 1980's, the Findlays approached Appellants about installing a boat dock on the easement. Id. Appellants agreed. Id. The Findlays proceeded to use the boat dock for boating, sunbathing, picnicking and similar activities. Id.

Appellants now contend that they were unaware that Mr. Findlay intended to use the dock for boating purposes. This is inaccurate based on the very documents contained within Appellants' Appendix. Specifically, Mr. Findlay sent Appellants a letter contemporaneous with installing his dock that confirmed his intentions:

> You have asked that I confirm in writing our intentions with respect to our easement usage on Pine Lake.
>
> * * *
>
> All of these sources have confirmed that both the Marshall's and my family have the right to our individual, seasonal docks and boats as long as the boats are registered in the family name. Accordingly, I have caused a seasonal dock to be installed on our easement property.

Appellants' Appendix at 18a. The Findlay's dock has been in constant use from 1988 to the present.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH LONGSTANDING MICHIGAN LAW

A. STANDARD OF REVIEW

This case was disposed of summarily in the trial court. As such, it is reviewed de novo. Michigan Educational Employees Mut Ins Co v Turow, 242 Mich App 112, 114; 617 NW2d 725, 727 (2000).

B. ARGUMENT

INTRODUCTION

The decision of the Court of Appeals is consistent with longstanding Michigan law. In fact, the Court of Appeals' decision is quite unremarkable. It is narrowly crafted to require a factual determination of the intent of the dedicator of an easement, a rule of law dating back many decades. The Court of Appeals should be affirmed or this Court should vacate its order granting leave.

Appellees do not dispute most of the basic propositions recited by Appellants. Appellees agree that Appellants are riparians, that riparian rights cannot be severed from riparian land, and that riparian rights are exclusive to riparian property owners.

Appellants devote much of their brief to examining cases involving either different

language in different easements (none of which is similar to the language in the easement at issue) or cases which involved different issues. Here, the easement in question states: "C. A. Muer Corporation . . . does hereby . . . grant a permanent easement for access to and use of the riparian rights to Pine Lake . . . ." Appellants' Appendix at 16a (emphasis added). As the Court of Appeals properly concluded, the meaning of the easement in this case is a question of fact to be decided in the trial court based on:

> the language in the easement itself and the circumstances existing at the time of the grant to determine if defendants' rights include building and maintaining a dock and the extent of defendants' rights to use the entirety of the easement.

Little v Kin, 249 Mich App 502, 514; 644 NW2d 375, 382 (2002).

Appellants' contention that Appellees have "nullified the non-severance and exclusive right doctrines for riparian owners" by attempting to enjoy the rights shared through the easement, Appellants' Brief at 22, is a mischaracterization of the law and what occurred here. In creating the easements, the C.A. Muer Corporation did not sever riparian rights from riparian property or somehow cause them to lose their exclusivity. Instead, the C.A. Muer Corporation created a real estate development where the two frontlot riparian owners agreed to share their riparian rights with the two lots behind them.

1. The Easement Does Not Sever Riparian Rights From Lakefront Property.

Only through the most attenuated logic can one argue that the riparian rights in this case have been severed from the riparian land. Appellants cannot — and do not — contest the fact that the full compliment of riparian rights continue to exist in the frontlot property. Through the easement, the front lot property owner simply allows certain, defined backlot property

owners to share in their use.

To be severed, rights must be separated, removed, or cut off, something which has not occurred here. This Court has dealt with the concept of severance in a number of settings. It has repeatedly been held that something is severed when it is separated or capable of division; one part must become distinct from the whole. In the contract context, a contract is severable when it can be divided or apportioned:

> [A]s a general rule, a contract is entire when, by its terms, nature and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable when, in its nature and purpose, it is susceptible of division and apportionment.

City of Lansing v Twp of Lansing, 356 Mich 641, 658; 97 NW2d 804, 813 (1959) (emphasis added).

A similar rule applies as to whether portions of an ordinance may be severed to cure defects in it. For example, this Court has stated:

> [E]ven without a severability clause, if the different parts of the ordinance are severable and independent of each other, and the provisions which are within the constitutional power of the legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the ordinance itself that it was the intent of the legislature to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded and the statute read as if these provisions were not there.

Eastwood Amusement Park v East Detroit, 325 Mich 60, 73; 38 NW2d 77, 82 (1949).

Many interests in real estate are severable. They are characterized by being "susceptible of division and apportionment" or when they are "independent of each other." For example, mineral rights may be severed and conveyed or leased to another and that person may grant

yet a similar right to someone else. E.g., Harlow v Lake Superior Iron Co, 36 Mich 105, 121 (1877). In Stevens Mineral Co v Michigan, 164 Mich App 692, 696-97; 418 NW2d 130, 133 (1987), the Court of Appeals stated:

> The owner of the land surface owns the minerals beneath his land. Ordinarily, a deed of land conveys the soil and all which it contains within the boundaries of the description in the deed. However, ownership of minerals in place may be severed from the remainder of the land by the proper conveyances. Severance of all interest in minerals from the remainder of the land may be accomplished by a reservation or exception in the deed. Upon severance of title to mineral interests from that of the remainder of the land, each estate may be a freehold of an estate in fee simple. Each estate is then subject to the laws of descent, devise, and conveyance.

(Citations omitted, emphasis added).

Other property rights are similarly severable. Timber rights may be severed and sold separately from the land. E.g., Mulder v Durand Hoop Co, 238 Mich 373; 213 NW 106 (1927). This Court has also held that crop rights are severable, Heilwig v Nybeck, 179 Mich 292; 146 NW 141 (1914), as are the rights to rents and profits, Case v Ranney, 174 Mich 673; 140 NW 943 (1913), the right to water flowage from the land, McMillan v Etter, 229 Mich 366; 201 NW 499 (1924), and the right to purchase ice, Higgins v Kusterer, 41 Mich 318; 2 NW 13 (1879).

Such distinctions make sense. Courts have recognized that mineral rights, timber rights and the like are distinct, have separate commercial value and do not depend on other elements of ownership.

On the other hand, riparian rights only spring into existence where a body of land meets the water. The delineation of the water's edge determines when and where the rights attach. E.g., Hilt v Weber, 252 Mich 198, 218; 233 NW 159 (1930). It is this unique, interdependent

relationship between water and land which distinguishes riparian rights from those rights which are "susceptible of division" and severable.

In this case, no right is severed, divided, or separated from the lakefront property. Through the easement, the original purchaser of the frontlot consented to allow the owner of the backlots to join in the enjoyment of the riparian rights. The easement runs with the backlots and cannot be sold separate from it. The riparian rights continue to attach to the frontlot and have not been sold or conveyed separate from it. As the Court of Appeals stated:

> [W]hile Michigan law does not permit the severance and transfer of riparian ownership or riparian rights normally enjoyed exclusively by owners of riparian land, it clearly allows a grantor to confer to non-riparian backlot owners an easement to enjoy such rights.

249 Mich App at 513; 644 NW2d at 381.

2. The Easement Does Not Violate The Doctrine Of Exclusivity.

A riparian has certain exclusive rights. E.g., Thies v Howland, 424 Mich 282, 287-88; 380 NW2d 463, 466 (1985). The sharing of riparian rights through an easement does not violate this rule.

Appellants make Herculean efforts to try to reconcile their position with the allegedly "inconsistent" decisions of this Court and the Court of Appeals to the contrary. Appellants' Brief at 9-11. While Appellants conclude that the Court of Appeals was incorrect in its analysis because it never explained "how 'exclusive' does not really mean 'exclusive'," Id. at 11, they apparently claim that "exclusive" means "singular" — that only one person (the frontlot owner)

can exercise riparian rights.[2]

However, the well accepted and longstanding definition of "exclusive" relates to the right to exclude. For example, Webster's Dictionary defines "exclusive" as: "to keep out," "to omit," or "to prevent." Black's Law Dictionary defines an exclusive right as "one which only the grantee thereof can exercise, and from which all others are prohibited or shut out." (4ed. 1968).

An "exclusive right" is one commonly found in the law. Perhaps the most prominent illustration relates to patent law. A patent provides the patent owner with the "exclusive" right to practice the invention. 35 USC §154(a)(1). The patent owner has the absolute right to exclude all others from practicing it. E.g., Dawson Chemical Co v Rohm & Haas Co, 448 US 176, 215 (1980); Continental Paper Bag Co v Eastern Paper Bag Co, 210 US 405, 424-25 (1908).

However, a patent owner may share that exclusive right with others. Patent owners regularly license their exclusive right to others for a fee.

> [A] patentee has the exclusive right to manufacture, use, and sell his invention. The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention.

Zenith Radio Corp v Hazeltine Research, Inc, 395 US 100, 135 (1969) (citations omitted).

Like other rights, the exclusive right which attaches to waterfront property can be used

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[2]Appellees assume that Appellants do not contend that "exclusive rights" can only be used by those who actually own the fee title. Such a contention would be unsupported, since, for example, an owner can lease property to a tenant (who is not the riparian owner) to take full advantage of the riparian rights.

to exclude all others — or it can be shared if the owner so chooses. As with any other property right, the riparian owner may choose not to exclude certain persons and may document that choice through an easement.

That is exactly what occurred in this case. When the C. A. Muer Corporation divided its property into six separate lots, it did not remove the exclusive ownership interest to the riparian rights from Appellants' lot. Indeed, Appellants simply agreed not to exclude Appellees from the use of their riparian rights.

Appellants' contention that the easement in this case provided only for an easement for access to Pine Lake is unsupported. Appellants rely on Schofield v Dingman, 261 Mich 611; 247 NW 67 (1933) and Turner Property Owners Assn v Schneider, 4 Mich App 388; 144 NW2d 848 (1966). Appellants' Brief at 15-17. A review of Schofield and Turner show that they stand only for the principles of non-severability and exclusivity and do not involve a consensual sharing of such rights.

The question in Schofield was whether riparian rights allegedly conveyed to backlot owners were enforceable. The Court held that such rights could not be "accorded lot owners separated from the beach by intervening lots," 261 Mich at 613; 247 NW at 68, and thus concluded that the backlot owners received only an easement for access. In essence, that case stands for the proposition that riparian rights cannot be severed from lakefront property.

In Schofield, there was no evidence that the frontlot owner had consented to share the riparian rights. To the contrary, the evidence was that the riparian had no actual or record knowledge that the backlot owner had been given any rights. Even under those facts (lack of consent, no knowledge), however, the Supreme Court favored the backlotters by imposing an

easement on the riparian for access by the backlotters.

Turner involved the same property 33 years later. Defendants, the backlot owners, claimed that the easement granted them by the Supreme Court in Schofield, was exclusive, i.e., they could exclude the frontlot owner from the easement. 4 Mich App at 389-90; 144 NW2d at 849. The Court of Appeals disagreed and followed Schofield. Since the backlot owners were not riparians because their property did not touch the water, they did not have the right to exclude.

3. The Court Of Appeals' Decision Narrowly And Properly Decided The Issue.

The error of the trial court, corrected by the Court of Appeals, was that it improperly characterized the elements of severability and exclusivity. Additionally, in reaching its decision, the trial court improperly ignored the specific words used by the dedicator. The trial court concluded that, as a matter of law, Appellees do not have "the right to construct fixtures, including, but not necessarily limited to, docks, and/or boat hoists." Appellants' Appendix at 38a. To achieve this result, the court disregarded the words in the easement and the testimony of Leo Beil, the dedicator, by holding that: "the words 'riparian rights' as provided in the easement, must be construed to mean nothing more than an easement appurtenant to such right." Id.

In reversing the trial court, the Court of Appeals remanded the case with explicit instructions:

> [o]n remand, in deciding the scope of defendants' rights under the easement, the trial court must consider the language in the easement itself and the circumstances existing at the time of the grant to determine if defendants' rights include building and

> maintaining a dock and the extent of defendants' rights to use the entirety of the easement.

249 Mich App at 514; 644 NW2d at 382. The Court continued:

> where possible, courts should honor the intent and established relationships of the parties by refraining from rewriting their original easement agreements, on which many residents of our state have relied for years without complaint or controversy. Furthermore, giving effect to the clear expression of the grantor in drafting easements for the benefit of lot purchasers appropriately honors the expectations of the parties.

Id. at 515 (emphasis added).

The Court of Appeals' analysis properly applies longstanding legal rules to this situation. The Court of Appeals properly recognized that the trial court had not considered all of the words used in the easement. See, Great Lakes Gas Transmission Co v MacDonald, 193 Mich App 571, 575; 485 NW2d 129 (1992). For more than a century, this Court has reiterated that a court should not reject the words used in a conveyance unless and until the evidence clearly shows that a mistake was made. Chief Justice Cooley recited this precept 119 years ago in Moran v Lezotte, 54 Mich 83, 86; 19 NW 757, 758 (1884) (emphasis added):

> [I]t is to be supposed that the parties have intelligently, as well as purposely and without error, made use of every phrase and every word which their deed contains; and in applying the deed to the subject-matter, the court must proceed upon this assumption until it is clearly made to appear that a mistake exists. Every word is to have effect, and to be harmonized with all the rest if that shall be found possible.

More recently, this Court again stated the same rule:

> [I]n arriving at the intent of the parties as expressed in the instrument, consideration must be given to the whole and to each and every part of it. . . [N]o language in the instrument may be needlessly rejected as meaningless, but, if possible, all the

> language of a deed must be harmonized and construed so as to make all of it meaningful. . .

Purlo Corp v 3925 Woodward Ave, 341 Mich 483, 487; 67 NW2d 684, 686 (1954) (citations omitted, emphasis added).

Here, use of the term "riparian rights" in the easement was not meaningless. There is no evidence that a mistake was made. The use of the term was consistent with the remainder of the language of the easement. The dedicator testified he said what he meant.[3]

In addition, the term "riparian rights" means the right to erect boat docks.

> Erecting or maintaining docks or boat hoists near the water's edge is a riparian or littoral right, and the parties are in agreement in that regard.

McCardel v Smolen, 404 Mich 89, 94; 273 NW2d 3, 5 (1978) (citations omitted).

The Court of Appeals followed these well-established rules, and also held consistently with its prior rulings. See, e.g.: Hoisington v Parkes, 1999 WL 33454008 (Mich App, March 12, 1999). In Hoisington, the defendants had an easement and right of way to access an inland lake. The easement limited the permissive uses by stating, "[s]aid land to be used for travel by pedestrians and for the movement of boats to and from said Lake but in no event to be used

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[3]Appellees contend that the dedicator's intent cannot be genuinely disputed. To paraphrase Dr. Seuss from "Horton Hatches the Egg:"

> He meant what he said
> He said what he meant
> This dedicator's certain
> One hundred per cent!

If Appellees cannot prove the dedicator's intent in this case, rare will be the case where it can be done.

for motor vehicle traffic or parking purposes." Id. at 2. Despite this limiting language, which does not exist in the case at bar, the trial court permitted the defendants to construct a boat dock.

On appeal, the Hoisington court recognized that non-riparian owners can obtain the right to construct boat docks through an easement. The limited language of the easement at issue in Hoisington prohibited this type of activity. The court stated:

> [b]ecause defendant's parcel does not touch the shore of Sand Lake, it is not riparian, and defendant accordingly has no riparian rights to Sand Lake. Thies v Howland, 424 Mich 282; 380 NW2d 463, 539 (1985)] (property separated from a body of water only by a right of way may have riparian rights while others authorized to use the right of way merely possess an easement). An easement or right of way does not give right to riparian rights unless the grant of easement or right of way evidences an intent to grant a specific riparian right, such as the construction of docks. Thies, supra at 294-295; see also Thompson, supra at 685.

Hoisington at 2 (emphasis added).[4]

Hoisington is not an aberration. The Court of Appeals has considered this same issue on a number of occasions and been consistent. See Evans v Gabriel, 1999 WL 33326785 (Mich App, December 28, 1999); Gross v Mills, 1999 WL 33435472 (Mich App, September 28, 1999); Woolley v Baier, 1999 WL 33441230 (Mich App, June 18,1999).[5]

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[4]Appellants cite Cabal v Kent Co Rd Comm, 72 Mich App 532; 250 NW2d 121 (1976) as an example of the alleged confused state of Michigan law. In Cabal, the Court of Appeals upheld a backlotters' right to erect a dock within an easement. This Court should not be persuaded by this argument because it has already cited Cabal with favor in Thies as an example of a situation where a backlotter can obtain boat docking rights even though this is a "right which normally is reserved to riparian owners." Thies, 424 Mich 282, 294, n9; 380 NW2d 469.

[5]Appellants make the interesting argument that "[t]his Court has enunciated a doctrine of exclusive rights for riparian owners, including docking rights." Appellants' Brief at 8 (emphasis added). According to the very case they cite for this proposition, Michigan actually

Appellants' real argument is a factual one — that "the easement in this case does not expressly convey docking rights" and, therefore, "the purported conveyance or reservation of 'riparian rights' in the easement can mean nothing more than a right-of-way access." (Appellants' Brief at 9). While this argument is contrary to the testimony of the dedicator, Mr. Leo Biel, who stated that his intent was to convey full riparian rights, which included boating, bathing, fishing and the building of a dock, supra, 2-4, it is a question of fact, not law.

The Court of Appeals' decision is also consistent with a number of other jurisdictions that have considered this same issue. One of the more often cited cases is the Minnesota Supreme Court case of Farnes v Lane, 161 NW2d 297 (Minn 1968). In Farnes, the backlot property owners obtained an easement for "right-of-way" to an inland lake. Id. at 299. The issue presented to the Minnesota Supreme Court was whether "a private easement appurtenant for a right-of-way to a lake include[s] by implication the right to install a dock. . . and to use it for boating and other purposes." Id. at 299.

The Minnesota Supreme Court echoed the applicable standard in Michigan when it concluded that boat docks are permissible if they are within the scope of the easement. The court stated:

> [t]he grantee of an easement or right-of-way to the lake may or

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recognizes that "[p]ersons who own an estate or have a possessory interest in riparian lands enjoy certain exclusive rights. These include the right to erect and maintain docks. . . " Hess v West Bloomfield, 439 Mich 550, 561-62; 486 NW2d 628, 633 (1992) (emphasis added).

Appellees have an easement which confers shared usage of Appellants' riparian property. This Court has previously concluded that such an easement represents an "interest in land." Thies, 424 Mich at 287, n5. Thus, even if boat docks are exclusive, Appellants must share that right with Appellees.

> may not be entitled to install and use a dock extending from the way into the lake, depending on the circumstances of the particular case. If the easement is granted in terms which clearly and specifically allow or deny this use, the language of the instrument creating the right will control.

Id. at 300 (emphasis added).

Where the easement is ambiguous, Minnesota courts are required to consider parole and extrinsic evidence to ascertain the scope of the easement and to check the scope against reasonable use of the property:

> [W]here, as here, the easement for a way is granted in general terms, no reference being made to the installation or use of a dock, the uncertainty must be resolved by applying the general principles of law relating to the construction of ambiguous writings. In addition to the rules which apply generally as in the ascertainment of intent in the use of words, extrinsic evidence may be considered relating to the facts peculiar to the particular easement involved on the assumption that the grantor intended to permit a use of the easement which was reasonable under the circumstances and the grantee expected to enjoy the use to the fullest extent consistent with its purpose.

Id. at 300 (emphasis added); see also: Lien v Loraus, 403 NW2d 286 (Minn Ct App 1987) (court applied same analysis as in Farnes and concluded that an easement for a "pedestrian walkway" did not include erecting a dock).

The Supreme Court of Indiana has also recognized that backlotters may erect boat docks if the grantor intended this use. Klotz v Horn, 558 NE2d 1096 (Ind 1990). In Klotz, the frontlotters sold the back portion of their property and retained the lakefront portion. The conveyance of the backlot included a recorded easement "for the purpose of access to Eagle Lake." Id. at 1097. The backlotters erected a pier at the end of their easement and parked their boat. The frontlotter, as in this case, claimed an exclusive right to erect piers on riparian

property and filed suit. The trial court determined that the backlotters could not erect the pier.

On appeal, the Indiana Supreme Court dispensed with the argument that only frontlotters can maintain piers by stating that "merely because [the backlotters] are not the riparian owners does not necessarily mean that they, as easement titleholders, cannot use the riparian rights of the servient tenant." Id. at 1097 (emphasis in original). To the contrary, the court held that backlotters may erect piers and moor boats if these rights are included in the easement:

> [D]ominant owners of lakeside easements may gain the rights to erect and maintain piers, moor boats and the like by the express language of the creating easement.

Id. at 1097-98.[6]

The Wisconsin Supreme Court may have stated it best:

> There are many non-riparian landowners in Wisconsin with lake access easements similar to the one in the present case. A rule of law validating lake access easements protects the clear expectations of non-riparian landowners that have relied on these easements for many years. The rule that riparian rights can be conveyed by easement carries out the obvious intent of the parties who entered into lake access easements.

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[6]The Indiana Supreme Court recognized some states have held that riparian rights cannot be conveyed to backlotters and cited Schofield, supra, for this proposition. The Indiana Supreme Court properly recognized, that Schofield does not apply in an easement dispute because easements involve use of property and not a conveyance:

> [t]he issue is not whether the [frontlotters] intended to convey away the whole of their riparian rights, but rather what the [frontlotters] and [backlotters] contemplated when they created this easement appurtenant 'for the purpose of access to Eagle Lake.

Klotz, 558 NE2d 1098.

Stoesser v Shore Drive Partnership, 494 NW2d 204, 209 (Wis 1993) (emphasis added). The same is true in this case.[7]

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[7]No state appears to recognize a common law bar to backlotters erecting boat docks within their easements. To the contrary, the state courts recognize that the easement language controls. If, based on the easement language, it is clear that boat docks were intended, then boat docks or piers are permissible. If the easement is ambiguous, then the courts look to parole and extrinsic evidence of the grantor's intent. Docks are permissible if parole or extrinsic evidence proves they were within the contemplated and reasonable scope of the easement. In addition to the above case, the following states have adopted this rule:

Connecticut: Ezikovich v Linden, 618 A2d 570 (Conn Ct App 1993);

Florida: Lanier v Jones, 619 So2d 387 (Fla Dist Ct App 1993); Hobbs v Kearney, 674 So2d 145 (Fla Dist Ct App 1996); Hume v Royal, 619 So2d 12 (Fla Dist Ct App 1993);

Maine: Badger v Hill, 404 A2d 222 (ME 1979), Rancourt v Town of Glenburn, 635 A2d 964 (ME 1993);

Maryland: Gwynn v Oursler, 712 A2d 1072 (MD Ct Spec App 1998);

Ohio: Gans v Andrulis, 2001 WL 530490 (Ohio App, May 18, 2001);

Oklahoma: Hudson v Lee, 393 P2d 515 (Okla 1964);

Texas: Lakeside Launches, Inc v Austin Yacht Club, Inc, 750 SW2d 868 (Tex App 1988); and

Wisconsin: Wendt v Blazek, 626 NW2d 78 (Wis Ct App 2001).

4. **Whether Severability And Exclusivity Depend On The Type Of Body Of Water, Whether The Original Grantor Owned The Entire Body Of Water And Surrounding Property Or Whether The Body Of Water Is Privately Or Publically Owned.**

Michigan law has long distinguished among various bodies of water. The bottomlands of the Great Lakes are held in trust by the State. Lorman v Benson, 8 Mich 18 (1860). The bottomlands of inland navigable waters are owned by the riparian owners, subject to the public right of navigation. Id. Non-navigable waters are private. Bott v Commission of Natural Resources, 415 Mich 45 (1982).

As to the Great Lakes, with thousands of miles of shoreline and tremendously complex issues of public policy involving multiple states and Canada, Appellees respectfully suggest that this case does not present a factual basis to address any issue involving them. This case should be confined to its facts. Since the Great Lakes are already legally distinct, Lorman, supra, any outcome in this case should not be applicable to them. Moreover, it would appear that the international and interstate issues should be resolved through other bodies. The complicated issues involving only Michigan should be subject to thorough fact-finding, public input, and expertise, and ultimately decided by the Legislature.

Appellees do not perceive any difference in the outcome of the issues presented in this case if the property was once entirely owned by a single grantor or if the water is private or public. While ownership of all of the property surrounding a lake generally means it is a private lake, the focus should be on the rights granted by the riparian owner as to the riparian property, not whether the lake is private or public.

The same is true as to the public/private water distinction. While that distinction is important in terms of how the public may use the water in certain circumstances, it does not

seem to follow that it would have any impact on whether an easement to use riparian rights is permissible. In either case, Appellees respectfully suggest that this case is not appropriate to decide such questions.

CONCLUSION

Michigan law is clear. A frontlotter cannot sell or sever riparian rights from riparian property. An easement to share in use of those rights, however, is proper. The fee owner has consented not to exclude certain backlotters. Depending on the intent of the grantor, these rights include the right to erect boat docks. This Court should affirm the decision of the Court of Appeals and remand the case for trial in the circuit court.

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